

20 December 2018

Prime Minister

Cc: Attorney-General

IPCA report on complaints about Deputy Commissioner of Police
Our Ref: POL055/2319

1. You have sought my advice following receipt of the Independent Police Conduct Authority (IPCA) report on three complaints about the Deputy Commissioner of Police. You have asked for advice as to whether the IPCA conclusions warrant your commencing a process to consider removing the Deputy Commissioner from Office.

Summary of advice

2. Under the Policing Act 2008 your role is to recommend the appointment of a Deputy Commissioner. You are therefore also able to recommend to the Governor General that a Deputy Commissioner be removed from office.
3. The office of the Deputy Commissioner is one of constitutional importance. Given the nature of the role, there must be a clear and proper basis to support removal.
4. After reviewing the IPCA report and findings, I advise there is not a clear and proper basis to support removal.
5. Specifically, IPCA found some of the behaviour complained of was unprofessional and inappropriate. Other behaviour complained of was found to be acceptable. But it is significant that the IPCA did not conclude it was bullying, as defined, even though it acknowledged some of the behaviour was consistent with bullying as that term is understood in common usage: paragraph 185. The IPCA recognized the particular inter-agency project from which the complaints arose was under considerable pressure.
6. On the third complaint the IPCA concluded that approaching staff for support was improper, because it made them uncomfortable and concerned about career progression. So too disseminating information about "Team member A" was improper.
7. The findings should be taken seriously. They do not reflect well on the Deputy Commissioner. However, they are properly of a nature and gravity that the Police Commissioner can and should deal with them as behavioral expectations.

Analysis

Removal of a Deputy Police Commissioner

8. The Deputy Police Commissioner is a statutory appointment. The Governor-General appoints the Deputy on the recommendation of the Prime Minister and the Deputy thereafter holds office at the pleasure of the Governor General: s 13, Policing Act.
9. While the Act does not set out a process for removal, the power to make an appointment includes the power to revoke or suspend the appointment: s 12, Interpretation Act.
10. A process for removal of a Deputy from office would consist of a recommendation from the Prime Minister for removal, followed by a decision by the Governor General whether or not to do so.
11. The constitutional role of the office of the Deputy Commissioner is such that there must be a clear and proper basis for removal even though appointment is “at pleasure.”
12. The requirements of procedural fairness in any process followed would need to demonstrate there was such a basis and not, for example, an intended diminution of constabulary independence.

Constabulary independence

13. Constabulary independence is a core constitutional principle in New Zealand. The Police are an instrument of the Crown (Policing Act s 7) but in their two principal roles of detecting and preventing crime and keeping the Queen’s peace they act independently of the Crown and serve only the law. It is for this reason the operational leaders of the Police the Commissioner and Deputy Commissioner, are vice-regal appointments.
14. The Deputy Commissioner, while reporting to the Commissioner is also a guard against any risk of abuse by the Commissioner of the considerable power reposed in him or her.
15. It follows that unless reserved for a plain case where their fitness to hold office is compromised, and shown on a proper basis, the threat of removal of either the Commissioner or Deputy Commissioner from office has the potential to compromise the independence of the Police.
16. The power to make a recommendation for removal must be seen in this context.

Fit and proper person

17. The standard applied for appointment of a Deputy Commissioner under s 13 of the Act is a “fit and proper person”. The same standard would apply to removal.
18. The question is whether there is an objective basis to believe the appointee is not a fit and proper person to discharge the role. The concept of “fit and proper” is not

defined in the Act but it is well known in the law. To be fit and proper for a statutory appointment a person must be honest and trustworthy and have the necessary experience, qualifications and characteristics to perform the role.

19. Even those who hold high office are susceptible to errors and lapses of judgment. Persistent lapses or serious errors may compromise their fitness for office but only if they lead a reasonable person to doubt whether they in fact possess the qualities that were thought to be there at appointment.

The threshold is not met here

20. The IPCA has inquired into three complaints. As the IPCA notes, their context was a difficult inter-agency project intended to achieve progress in improving justice outcomes for Māori. The IPCA accepted the Deputy Commissioner had done “a great deal of important and valuable work in improving the relationship between Māori and Police and has been committed to addressing the over-representation of Māori in the criminal justice system”: IPCA report, paragraph 10.
21. As “passionate” as the Deputy Commissioner and the team were found to be about the important inter-agency project, working across agencies requires collaboration and high levels of good communication. There is room for different opinions even when united behind a common goal and sophistication in leadership is required to bring those views together.
22. The IPCA findings are that on two occasions the Deputy Commissioner failed to adjust his behaviour to suit the circumstances, the result being behaviour which the IPCA found to be unprofessional.
23. Further, in respect of a third complaint, the Deputy Commissioner sought support from his colleagues, asked others to solicit support for him and, in that context, disseminated an email for the purpose of discrediting one of the complainants. This conduct the IPCA found improper. The IPCA’s conclusions on this conduct (at page 35) relate to the impact of the conduct on others, making them uncomfortable and concerned there may be repercussions for their career progression. It finds that conduct improper even though the Deputy Commissioner was acting on legal advice in seeking that support. It is important to note the IPCA does not find the Deputy Commissioner was improperly attempting to alter the Inquiry or influence witnesses before it.
24. The IPCA findings certainly reflect poorly on the Deputy Commissioner. There are matters relating to this behaviour that need to be addressed as a result.
25. However, in my view they fall short of providing a foundation for considering removal from office, especially when the independence of that office is of such high constitutional value.
26. The Deputy Commissioner is a statutory office holder and not a Police employee. Nonetheless the Police Commissioner has the authority to deal with these issues and give the Deputy Commissioner the necessary instructions for corrective action. In the event that the high standards of conduct expected of senior officials, including statutory office holders, are not met the Commissioner can take action.

27. I am available to advise the Police Commissioner on those processes more fully as required.

Yours sincerely

Crown Law



Una Jagose QC

Solicitor General